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No. 11, Original.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE STATE OF KANSAS, COMPLAINANT,

v.

THE UNITED STATES OF AMERICA ET AL.,
DEFENDANTS.

MOTION ON BEHALF OF THE UNITED STATES AND OTHERS TO DISMISS FOR WANT OF JURISDICTION, AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES OF AMERICA et al., defendants.

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MOTION.

Comes now the Attorney-General on behalf of the United States of America; Ethan Allen Hitchcock, Secretary of the Interior; Francis E. Leupp, Commissioner of Indian Affairs; Tams Bixby, Commissioner to the Five Civilized Tribes; J. George Wright, United States indian inspector for the Indian Territory; Dana H. Kelsey, United States indian agent for the Indians of the Union agency in the Indian Territory; the Muskogee or Creek nation or tribe of Indians; Pleasant Porter, principal chief of the Muskogee or Creek nation or tribe of Indians; John F. Ingram, David Whitlow, George W. Grayson, Napoleon B. Moore, Conny

Murphy, David A. Lee, Googan Sarty, James Childres, W. B. Rogers, Alexander L. Posey, Wm. N. Moore, Temiye Kernells, John Jefferson, Henry C. Reed, Sam Grayson, George Malvern, Jake (A. J.) Berryhill, Wattey Yahola, George Marshall, Robert Brener, Sarah A. Asbill, and Jake Smith, Creek Indian allottees, and the divers other allottees defendants in the above-entitled case, and appearing for the purposes of this motion only, moves the court to dismiss the bill of complaint, and as cause therefor respectfully submits the following reasons:

STATEMENT.

Suit is brought by the attorney-general of Kansas on behalf of the State as trustee for the Missouri, Kansas and Texas Railway Company of certain lands alleged to have been granted to the State for the benefit of the railroad company.

The act of Congress granting the lands in question (bill of complaint, pp. 21 to 33; 14 Stats. L. 236, 289) provides:

> That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort

Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile. * * *

SEC. 3. * * * And the lands hereby granted shall inure to the benefit of said company as follows: When the governor of the State of Kansas shall certifiy that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminus with said completed section hereinbefore granted.

SEC. 9. *And be it further enacted*, That the same grant [s] of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

The bill alleges that the road was properly constructed thru the Indian Territory (p. 64), and sets out at length Indian treaties and Congressional legislation with reference to that Territory, under

which it is alleged that the Creek Indian Nation has ceased to occupy or claim the same as a tribe or nation, that some of the lands have been allotted in severalty to individual members of that nation (p. 122), and that said lands thereby became a part of the public lands of the United States and past to the State under the provisions of the grant above mentioned.

A decree is therefore asked, adjudging that the State is the owner as trustee for the railway company of all odd numbered sections of land to the extent of the grant along the line of the road thru the Creek Nation in the Indian Territory, and that the allottees be directed to surrender possession to the State as trustee and be enjoined from disposing of said lands (p. 160), or "in the event that from any equitable considerations the court shall entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy" and the United States adjudged to pay to the State as trustee the sum of such values (p. 161), estimated at more than $10,000,000 (p. 159).

BRIEF.

I.

The suit is not one of which this court has original jurisdiction. A State is not a party within the meaning of the Constitution, Article III, section 2.

The State of Kansas has no substantial interest in the subject-matter, and is but nominally the complainant, the real party in interest being the railway company, as appears upon the face of the bill.

By the terms of the granting act the legal title past to the railroad company, if to anyone, at the date of the grant or at least upon the construction of the road.

In *Rice* v. *Railroad Company* (1 Black, 358), lands had been granted to the Territory of Minnesota "for the purpose of aiding in the construction of a railroad," and afterwards the granting act had been repealed by Congress. The court said (p. 381): "We think it is clear that the Territory acquired nothing under the act of Congress set up in the answer but *a mere naked trust or power to dispose of the lands* in the manner therein specified and to apply the same to the use and purpose therein described." The repealing act was therefore held valid.

It is a well-settled principle that a conveyance to trustees for certain purposes or uses carries the legal estate to the beneficiaries, unless there are duties imposed on the trustees the performance of which requires the legal estate to be vested in them, in which event they would take an estate commensurate with the exigencies of their trust. (*Webster* v. *Cooper*, 14 How., 488, 499; *Long* v. *Long*, 62 Md., 65; *Perry on Trusts*, secs. 351, 352, 520, 521.) This is the rule in Kansas (General

Statutes of Kansas [1905], sec. 8624; *Bayer* v. *Cockerill*, 3 Kans., 282, 292.)

It is equally established that when an estate is given to trustees for a certain purpose, or until the happening of a certain event, the intermediate estate of the trustee is terminated upon the accomplishment of the purpose or occurrence of the event. (*Felgner* v. *Hooper*, 80 Md., 262, *Perry on Trusts*, sec. 351.)

The grant here was "for the purpose of aiding the railroad company to construct and operate a railroad." If that purpose has been accomplished, or the State's share in the undertaking, then the trust has terminated and the legal title has become vested in the company; if it has not, then there is no cause for complaint.

There is evidence that the trust was executed by a transfer of the lands to the railroad company. A mortgage given by the predecessor of the company, dated November 14, 1868, on file in the General Land Office, recites that "the State of Kansas has accepted said grant from Congress and regranted the same to the party of the first part." That mortgage covers "all the lands and claims to lands which were granted to the State of Kansas and then granted by said State to said railway company." Apparently this conveyance was properly authorized. (Kansas General Statutes [1905], secs. 7335, 7338.)

But we submit that in this case the State was not even a trustee. It was no more than perhaps

a repository in which the title might remain pending the performance of the condition of the grant, or a conduit thru which title might thereupon pass.

The granting act, section 3, provides that patents shall issue, not to the State as in the case of *Rice* v. *Railroad Company*, *supra*, but to the railroad company direct.

Under such circumstances title vests in the company and not in the State. Thus said this court in the case of *Sioux City, etc., Railroad* v. *United States* (159 U. S., 349, 363):

> Another contention is that upon the issuing of the patents of 1872 and 1873 to the State for the use and benefit of the railroad company the title vested absolutely in the company, and the lands were thereby freed from restraints of alienation, from conditions subsequent, or from liability to forfeiture. In support of this contention reference is made to *Bybee* v. *Oregon and California Railroad*, 139 U. S., 663, 674, 676–677; *Van Wyck* v. *Knevals*, 106 U. S., 360; *Wisconsin Central Railroad* v. *Price County*, 133 U. S., 496; *Deseret Salt Co.* v. *Tarpey*, 142 U. S., 241; *St. Paul and Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S., 1, 6.
>
> *But these are cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued, not to the State for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be*

> *issued to the State for the benefit of the company. So that, until the State disposed of the lands, the title was in it, as trustee, and not in the railroad company.* (*Schulenberg* v. *Harriman*, 12 Wall, 44, 59; *Lake Superior Ship Canal and Co.* v. *Cunningham*, 155 U. S., 372. See also *McGregor, etc., Railroad* v. *Brown*, 36 Iowa, 655; *Sioux City and St. Paul Railroad* v. *Osceola County*, 43 Iowa, 318, 321.)
>
> In the case last named the Sioux City Company was relieved from the payment of the taxes upon some of the lands patented to the State for its benefit, upon the ground that the legal title was in the State, and the lands for that reason were not taxable. The question is altogether different from what it would be if patents for these lands had been issued, or if the State had conveyed them directly to that company.

This language was quoted with approval as a correct statement of the law in *Knepper* v. *Sands* (194 U. S., 476, 481).

A patent is not essential to a transfer of the legal title. It is simply evidence that the condition of the grant has been complied with. (*Deseret Salt Company* v. *Tarpey*, 142 U. S., 241.) Title passes by the grant upon the performance of its conditions, and, of course, the patent being evidence of title, it passes in the manner and to the grantee to whom the patent is to be issued. In this case, therefore, title past to the company, and the State of Kansas had no further interest in the transaction.

It can not be properly contended that the provisions of section 3 do not apply to the grant made in section 9. The latter section provides for "the same" grant as contained in section 2, and under this "same" grant patents were to be issued directly to the company. No provision for issuing patents in a different way is found anywhere. That each part of a statute should be construed with reference to every other part of it is too well settled to call for more than a reference. (Sutherland on Stat. Const., vol. 2, 2d ed., sec. 368.)

But the lands in Indian Territory were never granted to the State of Kansas. If granted at all the grant as to them was to the railroad company direct.

The first section of the granting act provides:

> That for the purpose of aiding the * * * Railroad Company * * * to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River *to the southern line of the State of Kansas, with a view to the extension of the same* through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section * * * on each side of *said* road.

Then section 9 provides:

> That the same grants of land through said Indian Territory are hereby made as provided in the first section of this act, when-

> ever the Indian title shall be extinguished by treaty or otherwise, * * * provided that said lands become a part of the public land of the United States.

The road in aid of which the grant was made to the State extended no farther than the southern boundary of Kansas. Section 9 significantly does not mention the State. A grant to a State of lands outside its boundaries would be out of the ordinary and remarkable. "With a view to an extension of the same thru a portion of Indian Territory" in section 1 and the language of section 9 speak entirely of future action and passing of title at a later date. Congress may have thought that by the time the road could be built and title could pass in Indian Territory some other State would be created within that jurisdiction, as is about to be done, or it may have intended that as all the conditions of the grant would be accomplished long before these Indian Territory lands could possibly become "public lands," the grant, if any, in Indian Territory should be to the company direct.

As patents were to be issued to the company and not to any State, and both grants were for the purpose of aiding a particular named company, and the lands mentioned in Sec. 9 were out of Kansas, it was unimportant to name the grantee of the grant made by that section. It was inconvenient to name a trustee and unnecessary to

preclude the possibility of constituting one in the future.

The State is not especially interested in the construction of a road beyond its boundaries, and Congress did not intend to grant to it the lands to be used for that purpose.

In formal communications and protests by it to the Dawes Commission, the town-site commission, the Indian agent, and the Secretary of the Interior, the tracts in question have been claimed by the railway company invariably heretofore as its own, without reference to any interest of the State therein. (Bill, pp. 111, 131, 138, 143, 149.)

Of the counsel for the State two at least belong to the legal department of the railway company. (Bill, pp. 137, 143, 149, 154.)

Apparently the proceeding is under the control of the railroad company and the name of the State is used simply for the purpose of prosecuting the claim of the company to the lands in question, the expense of the action being borne by the railroad.

Under these circumstances it is well settled that this court does not possess original jurisdiction.

Thus, in the case of *New Hampshire* v. *Louisiana* (108 U. S., 76), the State of New Hampshire, under an act of its legislature authorizing such assignments and suits, sought to bring an original action as assignee of valid obligations on the part of Louisiana. All expenses were to be paid by the assignor and the amount recovered by the attorney-

general of the State as *special trustee* and turned over to the assignor of the bonds after deducting expenses. This court held that the bondholders and not the State of New Hampshire were the real parties in interest, and that therefore it did not have original jurisdiction.

II.

This is not a suit by a State exclusively against citizens of another State.

Some of the parties defendant, other than the United States and its officers, are citizens of the Indian Territory, and it is submitted that therefore they can not be sued originally by a State in this court.

It is settled that a Territory is not a State in the sense in which that term is used in the Constitution, and that a suit by a citizen of a Territory can not be maintained under that provision of the Constitution declaring that the jurisdiction of the courts of the United States shall extend "to controversies between citizens of different States." (*Corporation of New Orleans* v. *Winter*, 1 Wheat., 92; *Downes* v. *Bidwell*, 182 U. S., 244, 250.)

As to some of the defendants, therefore, it is not a controversy between "a State and citizens of another State."

Jurisdictional qualities must exist as to all parties in order to confer jurisdiction. (*Great Southern Hotel Company* v. *Jones*, 177 U. S., 449.)

Therefore, being without jurisdiction as to those defendants who are citizens of Indian Territory, there is no jurisdiction as to any of the parties.

If it be contended that the subject-matter of the suit confers jurisdiction, the suggestion of Mr. Justice Brewer in the case of *Minnesota* v. *Hitchcock*, 185 U. S., 373, 384, is pertinent. He said:

> If it were held that this court had original jurisdiction of every case of a justiciable nature in which a State was a party and in which was presented some question arising under the Constitution, laws of the United States, or treaties made under their authority, many cases, both of a legal and an equitable nature, in respect to which Congress has provided no suitable procedure, would be brought within its cognizance.

III.

The United States, the real party in interest as defendant, has not consented to be sued, and can not be sued without its consent.

> If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States.
>
> The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the

judgment or decree which can be entered. (*Minnesota* v. *Hitchcock*, 185 U. S., 373, 387; *Oregon* v. *Hitchcock*, 202 U. S., 60.)

In this case the only parties defendant other than the United States and its officers are Creek Indian allottees and persons claiming under them, and if their allotments should be taken from them, which is a part of the relief sought by the bill, the United States would be subject, under acts of Congress and its agreements with them, to a demand from them for the value thereof or for other lands. (30 Stat. L., 514.)

The alternative relief sought is entirely against the United States, as follows:

> Or in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy at the time of the respective allotments, and the defendants, the United States of America, be ordered, adjudged, and decreed to pay to your oratrix, as trustee, the sum of such values.

The United States is therefore the real party in interest as defendant. It has not consented to be sued, and of course can not be sued without its consent, even by a State. (*Minnesota* v. *Hitchcock*, and *Oregon* v. *Hitchcock*, *supra*; *United States* v. *Lee*, 106 U. S., 196, 207.)

It is true that a State may be sued by the United States without its consent, the theory being that upon the admission of a State it thereby consents to be sued by the sovereignty of which it becomes a constituent part. (*United States* v. *Texas*, 143 U. S., 621.) The contention for the converse of this proposition, namely, that when a State is admitted the United States consents to be sued by it, is obviously unsound. The harm that may come from numerous suits against the General Government without its consent by the various States which compose it need not be suggested. The question was squarely decided and settled by the opinion of the court in *Minnesota* v. *Hitchcock* and *Oregon* v. *Hitchcock*, *supra*.

IV.

It does not appear that all the lands in controversy have been allotted. That the courts will not interfere with the Land Department in the disposal of land so long as the title in any sense remains in the United States is well settled. (*Bockfinger* v. *Foster*, 190 U. S., 116; *Oregon* v. *Hitchcock*, *supra*.)

V.

It is suggested, in passing, that in any event the grant in question was expressly declared to embrace public land only—that is, land which at the taking effect of the grant was subject to disposition under general laws, and these lands in Indian

Territory never became such. (*Newhall* v. *Sanger*, 92 U. S., 761.)

It is respectfully submitted that the suit should be dismissed for want of jurisdiction.

WM. H. MOODY,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

CHARLES W. RUSSELL,
Assistant Attorney-General.

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